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Impeachment and Law

By Matthew Nimetz

An important national debate is now focused on the constitutional phrase "high crimes and misdemeanors," the standard for impeachment.

A broadly accepted standard is needed to give legitimacy to a vote of impeachment and a subsequent conviction of President Nixon, but there is a second reason why care must be taken in formulating the standards and procedures to be applied in impeachment proceedings — to withstand a challenge in the courts.

Little public attention has been paid to the possibility that the standard for impeachment might be resolved in our traditional forum for dealing with constitutional questions, the Federal court system.

Certainly the constitutional language, granting "sole power of impeachment" to the House and "sole power to try all impeachments" to the Senate, does not appear to contemplate judicial involvement. But if the President wishes to fight impeachment with all the legal weapons in his arsenal, an appeal to the courts showed be expected.

At this stage one can only speculate about the scope and context of such an extraordinary legal action. Nothing like it would have been conceivable at the time of the Andrew Johnson impeachment, or indeed at any time until the activist decisions of the United States Supreme Court under Earl Warren. For throughout most of our judicial history the courts have tended to stay out of the "political thicket," and impeachment seems, at first glance, to be within the sole authority of the Congress. In fact, the Court of Claims so held in 1936. But today we cannot be so sure.

In Baker v. Carr, decided in 1962, the Supreme Court held that reapportionment of state legislatures was a matter with which the courts were capable of dealing. Although the questions there were far removed from impeachment, the Court opened the door to judicial involvement in political questions previously thought beyond its reach.

The Court said that even when a decision is constitutionally committed to another branch of Government, the question whether a particular action exceeds the authority committed "is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."

Of course, Baker v. Carr and its reapportionment progeny are not strictly in point.

A closer case, decided in 1969, involved the House decision to refuse to seat Adam Clayton Powell because of alleged misconduct. The Supreme Court, in reversing a lower court, which refused to hear the case, said that the judiciary should not shrink from deciding whether the House had applied the proper standard to exclude a member.

The issue, the Court held, was really not political at all: It did not involve legislative "policy" but simply required reading a provision of the Constitution and determining its meaning, pre-eminently a judicial function.

The similarities to our present situation are rather striking. Of course, this argument depends on reading the Powell case for all that it might be worth, but this is how constitutional law is often made.

If these two cases are unsettling, let us ask why impeachment should not under certain circumstances be a proper subject for judicial review.

Consider an outrageous case: The President is impeached solely because he held prayer breakfasts in the White House. Shouldn't the President be able to seek a declaratory judgment, an injunction or some other relief on the ground that this was simply not an impeachable offense?

This is an extreme example. But once we concede the possibility of judicial consideration of the standard for impeachment or due process in the Congress's procedures, the specter real. There are no final answers here. We are speculating about novel questions under our Constitution. But one thing seems certain: If the question whether the judiciary can review impeachment is presented, it can be answered definitively only by the Supreme Court.

Anyone who doubts that had better reread Marbury v. Madison, in which the doctrine of judicial supremacy was first enunciated. How ironic it would be if the decisions of the Warren Court helped to maintain President Nixon in office; how even more ironic if the Court under Warren E. Burger were to take the narrow view of its constitutional power that Mr. Nixon advanced in making judicial appointments and refused to review his impeachment and conviction.

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